

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOB'S DAUGHTERS INTERNATIONAL,

Plaintiff,

v.

HEIDI YOAST,

Defendant.

NO. 16-cv-1573-RSL

COUNTERCLAIM DEFENDANT
SHELLY COLE'S REPLY BRIEF IN
SUPPORT OF HER MOTION TO
DISMISS FOR LACK OF PERSONAL
JURISDICTION

NOTE ON CALENDAR: October 6, 2017

HEIDI YOAST,

Counterclaim-Plaintiff,

v.

JOB'S DAUGHTERS INTERNATIONAL,
SHELLY COLE aka SHELLY HOWRIGON,
an individual, ROD REID, an individual,

Counterclaim-Defendants.

Counterclaim Defendant, Shelly Cole aka Shelly Howrigon ("Cole"), submits this Reply brief in support of her Motion to Dismiss. Counterclaim Plaintiff Heidi Yoast ("Yoast") does dispute Ms. Cole's factual contentions or the conclusion that Cole is not subject to the general jurisdiction of the state of Washington. *See* Doc. Nos. 32, 35. Rather, Yoast argues

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IN SUPPORT OF HER MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION - 1
(16-cv-1573-RSL)

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Ms. Cole is subject to the specific jurisdiction the state of Washington. As a result, this Reply will focus on Yoast’s failure to meet her burden with respect to this Court’s ability to exercise specific personal jurisdiction over Ms. Cole.

A. COLE’S PURPORTED LIMITED CONTACTS WITH YOAST, EVEN IF ADMISSIBLE¹, ARE INSUFFICIENT TO CREATE SPECIFIC PERSONAL JURISDICTION.

To establish specific jurisdiction, the plaintiff must show that: (1) defendant purposefully availed itself of the privilege of conducting activities in Washington, thereby invoking the benefits and protections of its laws; (2) plaintiff’s claims arise out of defendant’s Washington-related activities; and (3) the exercise of jurisdiction would be reasonable. *Microsoft Corp. v. Aventis Sys., Inc.*, No. C16-1234RSM, 2016 WL 6650996, at *2 (W.D. Wash. Nov. 10, 2016) (citing *Easter v. American West Financial*, 381 F.3d 948, 960-61 (9th Cir. 2004); *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)).² It is Yoast’s burden to establish the first two prongs of this test, and if she meets this burden, the burden then shifts to Cole to show that the exercise of personal jurisdiction is unreasonable. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

1. Cole Has Not Purposefully Availed Herself Of The Privilege Of Conducting Activities in Washington

The first prong focuses on a “nonresident defendant’s contacts with the forum state that are relevant for purposes of a personal jurisdiction analysis.” *Gordon v. Virtumundo, Inc.*, No. CV06-0204JCC, 2006 WL 1495770, at *3 (W.D. Wash. May 24, 2006) (emphasis in original). “To establish purposeful direction, the plaintiff must show that the defendant committed an

¹ Portions of the “evidence” relied upon by Yoast that are attached to her Opposition or her Declaration consist of inadmissible hearsay and are not relevant to the claims in the Counterclaim. Ms. Cole objects to the admissibility of the same.

² Yoast points to the three-prong test from *Authentify Patent Co., LLC v. StrikeForce Technologies, Inc.*, 39 F.Supp.3d 1135, 1142 (W.D. Wash 2014) which applied the law of the Federal Circuit. However, *Authentify* was a patent infringement case, applying the controlling law of the Federal Circuit. In this case, because no patent infringement is alleged, the Ninth Circuit jurisprudence cited by Cole controls.

1 intentional act, expressly aimed at the forum state, causing harm that the defendant knows is
2 likely to be suffered in the forum state.” *Microsoft Corp. v. Commc'ns & Data Sys.*
3 *Consultants, Inc.*, 127 F. Supp. 3d 1107, 1114 (W.D. Wash. 2015). As the Supreme Court
4 recently explained, “the plaintiff cannot be the only link between the defendant and the forum,”
5 rather personal jurisdiction “must arise out of contacts that the ‘defendant himself’ creates with
6 the forum State.” *Walden v. Fiore*, 134 S. Ct. 1115, 1122, 188 L.Ed. 2d 12 (2014).

7 Importantly, the Ninth Circuit has repeatedly held that “use of the mails, telephone, or
8 other international communications simply do not qualify as purposeful activity invoking the
9 benefits and protection of the [forum] state.” *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th
10 Cir. 1985). Despite the clear holding in both *Walden* and *Peterson*, Yoast argues that (i) a
11 single phone call made by Cole to Yoast in September 2014, (ii) comments made by Cole to
12 Yoast in response to a photo posted on social media, and (iii) statements Cole allegedly made
13 while at a meeting in the state of Michigan, are collectively sufficient to establish Ms. Cole’s
14 purposeful contact with the state of Washington. *See* Doc. No. 36.

15 Furthermore, even if the telephone call or social media posts were sufficient to establish
16 purposeful contact under applicable law, Yoast’s contention that “Cole has consistently
17 reached into the state of Washington to inquire of Yoast regarding custom ordering from her
18 shop, to discuss matters of conflict..., and to post publicly on Yoast’s business pages...,” is
19 simply not supported by Yoast’s own evidence. Doc. No. 35, p. 4. Rather, the evidence
20 submitted by Yoast highlights the lack of purposeful contacts between Ms. Cole and the state
21 of Washington.³ Cole’s purported statements while at a meeting in Michigan do not establish
22 purposeful contact with the state of Washington. Furthermore, every communication but the
23 first set forth in Exhibit A to Yoast’s Declaration (Doc. 36-1), shows Cole responding to social
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25 ³ In her Opposition, Yoast does not challenge any of the factual statements made by Cole in support of the Motion to Dismiss.

1 media communications initiated by Yoast herself. There is a reason the limited social media
2 comments are insufficient to establish purposeful activities to the state of Washington. If such
3 social media comments were considered sufficient contacts with a forum state, then each
4 individual who commented on a social media site would be subject to the personal jurisdiction
5 of every state in which fellow commenters reside. Yoast cites no authority that supports this
6 novel proposition.⁴ Yoast simply cannot meet her burden to show Cole purposefully availed
7 herself to the privilege of conducting activities in the state of Washington.

8 2. Yoast's Counterclaim Against Cole Does Not Arise Out of Cole's Alleged
9 Contact with the State of Washington

10 Even if one were to assume Yoast could establish that Cole had purposeful activities
11 directed at the state of Washington, she still fails to meet her burden as she cannot meet the
12 second prong of the specific jurisdiction analysis. The second prong requires a court to
13 "determine whether a plaintiff's claim would have arisen but for a defendant's contacts with
14 the forum state." *Gen Ads, LLC v. Breitbart*, 435 F. Supp. 2d 1116, 1123 (W.D. Wash. 2006).
15 Here, the allegations in Yoast's counterclaim against Cole are not based on Cole's purported
16 contacts with the state of Washington. Again, Yoast alleges the following contacts between
17 Ms. Cole and the state of Washington: (i) a single phone call made to Yoast, (ii) social media
18 communications, and (iii) alleged statements made by Cole to other individuals at a meeting
19 that took place in Michigan. Even if true and admissible, the only purported contact that
20 relates to Yoast's counterclaims against Cole are the statements made in Michigan and the
21 social media posts.

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⁴ In fact, courts in the Ninth Circuit which have examined recent Supreme Court rulings have come to essentially
23 the opposite conclusion. "[T]he fact that the Supreme Court held that it would be a violation of the defendant's
24 due process rights to be forced to submit to personal jurisdiction based merely on his or her knowledge of the
25 plaintiff's location suggests that the high court's holding cannot be cabined to torts committed in the non-virtual
world. *Microsoft Corp. v. Commc'ns & Data Sys. Consultants, Inc.*, 127 F. Supp. 3d 1107, 1115 (W.D. Wash.
2015) (citing *Under A Foot Plant v. Exterior Design, Inc.*, 2015 U.S. Dist. LEXIS 37596, 2015 WL 1401697, at
*4 & n. 1 (D.Or. March 24, 2015)).

1 Yoast's counterclaims against Cole include claims for (1) intentional interference with
2 contractual relationship; (2) interference with business expectancy; (3) defamation; and (4)
3 intentional infliction of emotional distress. *See* Doc. No. 17. The first three claims for relief
4 all stem from the statements Cole allegedly made "at the Supreme Session," which Yoast
5 admits took place in Grand Rapids, Michigan. *Id.* at ¶¶ 13, 21, 29, 33, 40. Yoast's fourth
6 claim against Cole simply points to false allegations, reports or statements Cole allegedly
7 made. *Id.* at ¶ 40. None of these allegations include Washington related activities. *Id.* Rather
8 the counterclaim involves statements allegedly made in Michigan and social media comments.
9 *Id.* In short, the evidence to which Yoast points to support her contention that personal
10 jurisdiction exists is in no way related to the actions at issue in the Counterclaim. As a result,
11 Yoast fails to meet her burden with the second prong of the specific jurisdiction analysis.

12 3. Personal Jurisdiction Over Cole Would Not Be Reasonable

13 Although the Court does not need to address the third prong of the specific jurisdiction
14 analysis due to Yoast's failure to meet her burden with respect to the first two, Cole offers the
15 following analysis for purposes of completeness. When the plaintiff has a weak case with
16 regard to the first two parts of the three prong test, as is the case here, the defendant's burden to
17 show unreasonableness is much lower. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201,
18 210 (1st Cir. 1994).⁵

20 Yoast identifies five factors from Federal Circuit jurisprudence;⁶ this is not the correct
21 test. The correct test in the Ninth Circuit identifies six or seven factors. It was recently stated
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23 ⁵ Again, Yoast relies on a W.D. of Washington case applying the factors from the Federal Circuit, rather than the
24 *Brand* factors which are applicable here. *See e.g., Microsoft Corp. v. Aventis Sys., Inc.*, 2016 WL 6650996, at *5
(citing to and applying the *Brand* factors).

25 ⁶ Even looking to the factors Yoast identifies in her opposition, on these facts Cole undoubtedly meets her low
burden with respect to this factor as the exercise of personal jurisdiction over Cole in this matter is unreasonable.

1 by a Western District of Washington Court as: “1) existence of an alternative forum; 2) burden
2 on the defendant; 3) convenience and effectiveness of relief for the plaintiff; 4) most efficient
3 judicial resolution of the dispute; 5) conflict with sovereignty of the defendants' state; 6) extent
4 of purposeful interjection; and the forum state's interest in the suit.” *Microsoft Corp. v. Aventis*
5 *Sys., Inc.*, 2016 WL 6650996, at *5 (citing *Brand v. Menlove Dodge*, 796 F. 2d 1070, 1075 (9th
6 Cir. 1986)).

8 First, there is no doubt that an alternative forum exists, one such forum is Utah, the
9 residence of Cole. The second and third factors weigh in favor of not finding personal
10 jurisdiction. While Plaintiff’s interest in obtaining relief is a factor, there is nothing stopping
11 Yoast from seeking relief in the appropriate Court where Cole is subject to personal
12 jurisdiction. In contrast, requiring Ms. Cole to travel to Washington to defend the
13 Counterclaim would create a significant burden on her. Cole is a resident of the state of Utah,
14 and if she is required to travel to Washington to defend Yoast’s counterclaim, she would incur
15 great expense, burden, and inconvenience. While Yoast contends that Cole “will be traveling
16 into Washington State for her deposition and to testify at trial,” this is simply incorrect. *See*
17 *Doc. No. 35*. Cole has made no such commitment. Cole has agreed to make herself available
18 for deposition in Omaha, Nebraska, the home office of Job’s Daughters International. *See*
19 *Declaration of Brian T. McKernan, ¶12*. She has not made any commitment to attend a trial in
20 Washington. *Id.*

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24 Yoast points to the following factors: (1) the burden on the defendant; (2) the interests of the forum state; (3) the
25 plaintiff’s interest in obtaining relief; (4) the interstate judicial system’s interest in obtaining the most efficient
resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive
social policies.” *Authentify Patent Co., LLC v. StrikeForce Techs., Inc.*, 39 F. Supp. 3d 1135, 1147.

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1 Yoast further contends that Cole will be traveling for the next twelve months as a result
2 of Cole's position with JDI and that she will not be present in the state of Utah during that
3 time. Such analysis is misplaced. The issue is the burden placed on Cole and whether she is
4 subject to the jurisdiction of a Washington court. Given the complete absence of any
5 meaningful contact between Cole and the state of Washington, which Yoast does not refute, the
6 expense, inconvenience and burden this would place on Cole would be unreasonable. The
7 plaintiff's interest in convenient and effective relief is far outweighed by the burden imposed
8 upon the defendant. "[I]n this circuit, the plaintiff's convenience is not of paramount
9 importance." *Menken v. Emm*, 503 F.3d 1050, 1061 (9th Cir. 2007); *Dole Food Co., Inc. v.*
10 *Watts*, 303 F.3d 1104, 1116 (9th Cir.2002).

12 Fourth, the judicial system's interest in obtaining the most efficient relief must be
13 considered. While it might be more efficient to have Cole come to Washington because
14 Yoast's counterclaim against JDI and Cole are similar, the burden to Cole far outweighs this
15 singular factor. Defendants are not subject to the jurisdiction of any court simply because it
16 might be more judicially efficient when every other factor weighs in favor of finding that
17 exercising such jurisdiction would be unreasonable.

18 The fifth factor, state sovereignty, is not at issue in this case.

19 The sixth factor looks to the interest of the forum state. Here, the alleged acts relevant
20 to the Counterclaim, even if taken as true, took place in Michigan, not in Washington. Thus,
21 while Washington may have an interest in protecting its residents (as Yoast contends), the
22 alleged actions that gave rise to Yoast's claim simply took place in another state. Finally, with
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regard to the interests of Washington and Utah, this factor is neutral because the laws applicable to Yoast's claims are substantively similar.

Because Yoast cannot carry her burden as to the first two prongs of the personal jurisdiction test, analysis of the reasonable factors are unnecessary. Still, looking at the applicable reasonableness factors, it is clear that subjecting Cole to the personal jurisdiction of this Court would be unreasonable and contradict the traditional notions of fair play and substantial justice. Cole's motion to dismiss for lack of personal jurisdiction should be granted.

CONCLUSION

The allegations that form the basis of Yoast's claims against Cole are in no way related to any of the contacts Yoast contends Cole had with the state of Washington. Yoast has failed to meet her burden of establishing that Cole had sufficient contacts with Washington or that what contacts Cole allegedly did have gave rise to Yoast's claims against Cole. Furthermore, to subject Cole to the personal jurisdiction of this Court despite Cole's complete lack of contact with the state of Washington would be so unreasonable so as to offend the traditional notions of fair play and substantial justice. Cole's motion to dismiss for lack of personal jurisdiction must be granted.

1 DATED this 6th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2017, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

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